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Supreme Court, U.S.
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No. 07-4

In the
Supreme Court of the United States

HELEN GOLAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the federal courts of appeals have appellate jurisdiction over appeals filed by defendants in criminal cases where the district courts, over the objections of the defendants, dismiss indictments without prejudice when the district court's dismissals are made without affording the defendants hearings on the question of whether the dismissals should be without prejudice?

2. Does a defendant in a federal criminal case have the right to be heard by a federal district court on the issue of whether the indictment should be dismissed with or without prejudice?

3. If a federal district court dismisses an indictment without prejudice over the objection of a defendant who is deprived of a hearing on the issue (and who was arrested and detained for 90 days and whose request for a speedy trial was rejected when the district court previously postponed the scheduled trial over the defendant's objection), may the defendant appeal the dismissal without prejudice to a court of appeal?

4. Does this Court's 5 to 4 decision in *Parr v. United States*, 351 U.S. 513, 76 S. Ct. 912 (1956), which upheld the Court of Appeal's order dismissing an appeal from a district court's dismissal without prejudice, apply to a case where there is no second, parallel indictment which the Government desires to pursue?

5. Is this Court's 5 to 4 decision in *Parr v. United States*, 351 U.S. 513, 76 S.C. 92 (1956), still valid in light of this Court's subsequent decision in *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034 (1977), which allowed a defendant

to appeal prior to a final sentence, which this Court previously said in *Parr* was a jurisdictional prerequite to an appeal?

PARTIES TO THE PROCEEDINGS

Petitioner: Helen Louise Golay is the Petitioner. She was a defendant in a pending criminal case in the United States District Court for the Central District of California. Although her federal case was dismissed she is currently in custody awaiting trial in the Los Angeles County Superior Court.

Respondent: United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner Helen Louise Golay ("Golay") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed and entered on April 6, 2007 dismissing Golay's appeal from an Order of the United States District Court for the Central District of California filed August 16, 2006 which dismissed a federal indictment against Golay without prejudice.

OPINIONS BELOW

The unpublished order of the United States District Court for the Central District of California dismissing the Indictment without prejudice on August 16, 2006 is not reported. It is Appendix C.

The unpublished Order of the Ninth Circuit Court of Appeals filed April 6, 2007 dismissing the appeal is not reported. It is Appendix B.

The unpublished judgment of the United States Court of Appeals for the Ninth Circuit filed and entered April 6, 2007 dismissing the appeal is not reported. It is Appendix A.

STATEMENT OF JURISDICTION

On August 16, 2006 the United States District Court for the Central District of California filed its "Order Dismissing Indictment Without Prejudice." (Appendix C) The United States District Court had jurisdiction under Title 18, United States Code Section 3231.

Golay filed a timely Notice of Appeal on Monday, August 28, 2006. The Notice of Appeal was timely filed because the

tenth day after the Order of Dismissal was Saturday, August 26, 2006. Golay had the right to file her Notice of Appeal on the Monday following the expiration of the tenth day. In filing her Notice of Appeal Golay invoked the jurisdiction of the United States Court of Appeals for the Ninth Circuit by referring to Title 28, United States Code, Section 1291.

On April 6, 2007 the United States Court of Appeals for the Ninth Circuit filed its Order (Appendix B) and its judgment (Appendix A) dismissing the appeal for lack of jurisdiction.

Golay is invoking the certiorari jurisdiction of this Court by filing this Petition within 90 days of April 6, 2007. The 90th day is July 5, 2007. This Court has certiorari jurisdiction to decide whether the Court of Appeals properly dismissed the appeal pending before it for alleged lack of jurisdiction. *See* 28 U.S.C. §1254 (1) and *see Bowles v. Russell*, 551 U.S. ___ (2007) (decided June 14, 2007). This Petition is being filed pursuant to Rule 13 of the Supreme Court Rules.

STATUTORY PROVISION INVOLVED

Title 28, United States Code, Section 1291 provides, in part, as follows:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

STATEMENT OF THE CASE

In September 2005 the Los Angeles Police Department was investigating the deaths of two persons, Paul Vados and Ken McDavid (Excerpt of Record filed with the United States

Court of Appeals for the Ninth Circuit, pp. 20-21, hereinafter "ER"). Specifically, Paul Vados was killed by an apparent hit and run driver in an alley in Hollywood in 1999 and Ken McDavid was apparently killed by a hit and run driver in an alley in Westwood in 2005. The Los Angeles Police Department investigated these deaths and tied them together because both Mr. Vados and Mr. McDavid had a number of life insurance policies wherein Golay and co defendant Olga Rutterschmidt were named as beneficiaries. In October 2005 the Los Angeles Police Department detectives investigating the two deaths contacted the Federal Bureau of Investigation ("FBI"). At that time according to the government, the LAPD's investigation indicated that Golay and Rutterschmidt appeared to have fraudulently obtained numerous life insurance policies on McDavid and Vados. Beginning in October 2005 the LAPD and the FBI jointly investigated both the insurance fraud aspect of the case and the murder aspect of the case. *See* Declaration of Jason P. Gonzales, Assistant U.S. Attorney, attached to the Government's motion to dismiss the indictment (ER 20-24).

On May 16, 2006 the FBI obtained a federal complaint against Golay and Rutterschmidt (ER 55). Essentially they were accused of violating Title 18, Untied States Code, Section 1341. Both Golay and Rutterschmidt were arrested on May 18, 2006 and taken into federal custody. Both were detained without bail (ER 55-56).

On May 30, 2006 both Golay and Rutterschmidt were indicted jointly by a federal Grand Jury and formally charged with mail fraud (ER 1). Essentially it was alleged that both of them engaged in a fraudulent scheme to obtain life insurance on Ken McDavid. On June 5, 2006 both of them were arraigned post indictment (ER 57-58).

The jury trial was set at the arraignment for July 25, 2006 (ER 58).

Golay was held in custody at the county jail in San Bernardino. Rutterschmidt was kept at the Metropolitan Detention Center in downtown Los Angeles (ER 42-44; 57-60).

On June 8, 2006 Golay filed a motion for order setting bail. The hearing was to be conducted on July 10, 2006 (ER 58).

Golay also requested that if her motion for bail should be denied she should still be moved from the county jail in San Bernardino to the Metropolitan Detention Center in downtown Los Angeles (ER 58).

The bail hearing was advanced to July 5, 2006 and on that day the Court denied the request for bail (ER 58-59). The Court did order Golay transferred from the county jail in San Bernardino to the Metropolitan Detention Center. At that time Golay's trial was still scheduled for July 25, 2006 (ER 58-60).

However, on July 18, 2006 at the request of the Government a Status Conference was held by District Judge R. Gary Klausner. Over the objection of Golay, the trial was continued from July 25 to October 24, 2006 (ER 60).

On July 31, 2006 the District Attorney of the County of Los Angeles filed state court murder charges against Golay and Rutterschmidt in the Los Angeles County Superior Court (ER 25). The charges were based upon the same investigation being jointly conducted by the FBI and the Los Angeles Police Department. On the following day, August 1, 2006 the

United States Government filed an ex parte application to dismiss the federal indictment without prejudice on the stated ground that the federal government wanted to allow the state to proceed first with the murder charges against Golay and Rutterschmidt (ER 10-24).

On August 7, 2006 Golay filed Opposition to the Government's application to dismiss the indictment without prejudice (ER 41). In her Opposition papers Golay requested a hearing in Court on the issue of whether the Government could dismiss the indictment without prejudice. Golay indicated in her Opposition that she had no opposition to a dismissal with prejudice. The basis for her Opposition was that the Government was seeking to have the indictment dismissed without prejudice. Golay was concerned that after winning the state murder charges she would then be reindicted by the federal government and be forced once again to defend herself in the federal court. Golay was also concerned with the fact that she would have spent 90 days in federal custody with no credits and for no purpose (ER 41-49). Golay believed, and wanted a hearing to prove, that the federal case was a sham and that it was used for the sole purpose of taking her and Rutterschmidt into custody to allow state murder charges to be pursued while they remained in federal custody. Golay wanted to demonstrate that the Government never intended to pursue the federal case.

On August 16, 2006, without conducting a hearing and without conducting oral argument, the District Court granted the Government's ex parte request to dismiss the indictment without prejudice (ER 50). The District Court's order did not even indicate whether the court read or considered Golay's written opposition.

The federal government thereafter released Golay and Rutterschmidt to the police for placement in state custody. Golay and Rutterschmidt were then transferred to the custody of the Sheriff of the County of Los Angeles where they have remained in the county jail since August 17, 2006. The irony is that the Los Angeles County jail is farther from the Los Angeles County Court where they would be tried on state murder charges than the Federal Metropolitan Detention Center. It should also be noted that a person in a county jail may still be tried for a federal crime in a federal court. *See* California Penal Code §4005.

Golay timely filed a Notice of Appeal on August 28, 2006 (ER 52) challenging the authority of the Government to dismiss the case against her wishes without prejudice. Golay justifably fears another indictment and prolonged incarceration without bail while she contests the re filed charges. Golay challenged the conduct of the Government in having her arrested in the first place. Golay asserted in her appeal that the District Court violated her rights by not conducting an evidentiary hearing with respect to the issue of dismissal with or without prejudice. Also Golay asserted in her appeal that the District Court erred by not even giving her the chance to appear in open court to argue the matter.

Golay filed her Opening Brief with the United States Court of Appeals with the Ninth Circuit on December 18, 2006. Instead of filing a Reply Brief, the Government on February 26, 2007 filed a Motion to Dismiss Golay's appeal on the ground the Court of Appeals for the Ninth Circuit lacked jurisdiction. Golay filed opposition to the Government's motion to dismiss her appeal on March 5,2007.

On April 6, 2007 the United States Court of Appeals for the Ninth Circuit filed its order and judgment dismissing the

appeal for lack of jurisdiction. The Ninth Circuit did not conduct a hearing on the Government's motion.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THIS COURT'S FIVE TO FOUR DECISION IN *PARR v. UNITED STATES*, 351 U.S. 513, 76 S. Ct. 912 (1956) IS STILL VALID IN LIGHT OF *ABNEY v. UNITED STATES*, 431 U.S. 651, 97 S. Ct. 2034, 52 L.Ed.2d 651 (1977)AND, IF IT IS STILL VALID, WHETHER IT APPLIES TO FINAL DISMISSALS WHERE THERE IS NO ADDITIONAL PENDING FEDERAL CASE AND WHERE THE STATUTE OF LIMITATIONS HAS NOT RUN

The United States Court of Appeals for the Ninth Circuit dismissed Golay's appeal for alleged lack of jurisdiction. The Ninth Circuit cited this Court's decision in *Parr v. United States*, 351 U.S. 513, 76 S. Ct. 912 (1956) to support its dismissal of Golay's appeal.

This Court's five to four decision in *Parr v. United States*, *supra*, bears only superficial similarity to the jurisdictional issue resolved by the Ninth Circuit against Golay with respect to her appeal from the dismissal by the District Court of the indictment without prejudice.

In *Parr v. United States*, *supra*, the Government obtained an indictment against Mr. Parr for income tax evasion. The indictment was filed in the Corpus Christi Division of the United States District Court for the Southern District of Texas. The District Court in Corpus Christi granted Parr's motion to change venue to the Laredo Division of the Southern District.

The Government apparently did not want to try the case against Mr. Parr in Laredo. Accordingly, the Government obtained a new indictment against Parr in the Austin Division of the Western District of Texas. The next day the Government moved in the Corpus Christi Division for leave to dismiss the first indictment. Over Parr's objection, the District Court granted the Government's motion to dismiss.

Mr. Parr appealed the order of dismissal to the United States Court of Appeals for the Fifth Circuit. On a two to one vote, the Fifth Circuit granted the Government's motion to dismiss the appeal on the ground that the order was not appealable. This Court granted certiorari to consider both the merits of the appeal as well as the question of appealability.

This Court concluded on a five to four vote that Mr. Parr could not appeal the dismissal order to the Fifth Circuit. Chief Justice Earl Warren and Justices Black, Douglas, and Clark dissented. The majority of this Court in *Parr v. United States*, *supra*, stated that Mr. Parr could not pursue his appeal to the Fifth Circuit because he was not "aggrieved."

The majority reasoned that even if the dismissal left Mr. Parr open for further prosecution he could only test the effect of the dismissal order if he should be convicted .

The majority opinion did not deal with the a case where the defendant is in custody with no bail being set and where her speedy trial right has been violated. Nor did the majority deal with a dismissal that was opposed where the defendant was deprived of a hearing to contest the dismissal without prejudice.

The majority stated that should Parr be convicted he could raise on appeal from such a conviction the validity of the

dismissal order even though that dismissal order would have occurred in a case with a different case number. The majority did not seem to be impressed with the contention that Mr. Parr would suffer injury simply by having to endure a trial. The majority's conclusion that enduring a trial itself is not an injury that would otherwise justify appellate jurisdiction was undermined 21 years later by this Court in *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L.Ed.2d 651 (1977). In the *Abney* case this Court held (with Chief Justice Burger writing the opinion) that enduring an unnecessary trial itself is a form of an injury for which the courts provide a remedy. This Court in the *Abney* case held that an order denying a motion to dismiss an indictment is appealable when the defendant seeking to appeal the denial of the motion to dismiss contends that the Double Jeopardy clause of the Constitution would be violated. This Court specifically rejected the argument of the Government that the remedy for a violation of the Double Jeopardy clause would be an appeal from any conviction. Thus, having to endure an unnecessary and unjustified trial makes the defendant aggrieved sufficient to allow her to appeal. If a defendant in a criminal case has the right to appeal the denial of a motion to dismiss, where the appeal would cause delay in the proceedings, then clearly one should be able to appeal a dismissal order. This Court at footnote 8 acknowledged that its decision could encourage some defendants to engage in dilatory appeals. The Solicitor General expressed those fears to this Court. This Court said that perhaps that problem could be mitigated or avoided by providing expedited treatment for those appeals. However, an appeal from an order denying a motion to dismiss does disrupt the trial calendar and does cause some delay. In contrast, an appeal by a defendant for whom a case has been dismissed creates no delay problems. By definition, there is no longer any case pending in the District Court when the appeal is pursued. Moreover, the instant case differs from *Parr v.*

United States because in that case the Government wanted to pursue the same indictment in a different division or district of the Court. Accordingly, the same disruption and delay about which this Court expressed some concern in the *Abney* case would have existed in the *Parr* case had the appeal been permitted. That is so because the Government instituted a parallel case at the time it obtained the dismissal.

Here, in contrast, there is no parallel federal case pending against Ms. Golay. In the *Parr* case had the appeal been permitted, the other District Court wherein the Government sought and obtained the indictment would have had to await the outcome of the appeal. Here, in contrast, there is no comparable interference with the proceedings of another District Court.

Here, based upon the undisputed record in this case, there is no question but that Golay could have been brought to trial in October 2006. There is no reason why Golay could not have been brought to trial prior to the commencement of the preliminary hearing in the state court.

The Government may try to distinguish the *Abney* case from the instant case by pointing out that *Abney* involved the application of a constitutional right under the Double Jeopardy clause. In response, Golay respectfully points out that she, too, has constitutional rights involved in this proceeding. Specifically, she has a right to a speedy trial under the Sixth Amendment and a right not to be detained indefinitely without bail, a right granted to her under the Eighth Amendment to the U.S. Constitution.

Golay has been in custody since May 18, 2006 and has yet to have a trial in the federal court or a trial in the state court. If the Government is right, when she prevails in the state

court and obtains an acquittal, whenever that should occur, she would not be free to leave the court by the front door entrance. Rather, after the jury acquits her, she will be most assuredly retransferred to federal custody where the clock would begin again. Apparently she would have no right under the Double Jeopardy clause to seek a dismissal and, should the motion be denied, seek an immediate appeal. Rather, according to the Government she would have to go to trial (in custody) and then appeal any conviction. Ms. Golay was 75 years old when arrested on May 18, 2006 and she has already celebrated one birthday in custody. She is now 76 years old.

Just when does the Government believe Ms. Golay would finally obtain appellate review of any conviction in a federal court after a reindictment following an acquittal in the state court. Without a final conviction upheld by an appellate court the Government could effectively keep Golay in custody for the rest of her life. This is something she adamantly opposes. She is not guilty of the charges and wishes to have her day in Court. She is entitled to a trial and meaningful appellate review. She spent 90 days in federal custody for no reason and has no credit for it.

Abney v. United States, decided 21 years after *Parr v. United States*, has undermined the rationale of the *Parr* case which, as the analysis herein has demonstrated, does not control this case in any event.

Congress seems to have spoken quite explicitly in this particular case. Title 28, United States Code, Section 1291, provides, in part, as follows:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

It would appear that the language in Section 1291 should govern this case. We have a final decision of a district court. Golay has filed a timely appeal from that final decision. In *Parr v. United States*, *supra*, there was a second indictment before the first indictment was dismissed. Therefore, arguably the decision of the district court to dismiss the first indictment might not be considered to be a final decision. That is so because the record indicated that there already was a second indictment on file. Here, in contrast, there has been no second indictment. Thus, the dismissal of the indictment in this case is a final decision. Section 1291 does not provide for any exceptions.

In *Bowles v. Russell*, 551 U.S. ___ (2007) the five member majority of this Court stated that Congress had created *no* exceptions to the requirement that a notice of appeal had to be filed within 14 days of the order of the district court reopening the time in which to file a notice of appeal pursuant to 28 U.S.C. §2107(c). In that particular case this Court's slender five member majority refused to find an equitable exception to the 14 day rule of Section 2107(c) even though the attorney for the habeas corpus petitioner in that case, who was challenging a state court murder conviction, relied upon an erroneous determination by the district court judge that the attorney would have 17 days to file the notice of appeal whereas the statute limited him to 14 days. In *Bowles v. Russell*, the majority expressed no concern in defeating the appellate right of the particular state court defendant who had been convicted of a crime in the state court. Chief Justice John Roberts seems to have ignored his distaste for bureaucratic refusals to find exceptions in order to

do justice. See his decisions for the Court in *Gonzales v. O Centro Esp. Benef. Uniao Do Vege*, ___ U.S. ___, 126 S. Ct. 1211 (2006) and *Jones v. Flowers*, ___ U.S. ___, 126 S. Ct. 1708 (2006).

Justice Thomas, who wrote the unbelievable opinion in *Bowies v. Russell*, seems in footnote 4 not to care that adherence to a technical rule actually resulted in the execution of a defendant whose case was awaiting review by this Court (the clerk returned the cert petition as being untimely).

One wonders whether the five member majority of this Court only refuses to find equitable exceptions when to do so would help a defendant in a criminal case. Here in order to defeat appellate jurisdiction by the Ninth Circuit this Court would have to read an exception into Section 1291. By granting certiorari this Court would show cynics that its refusal to carve exceptions in statutes applies equally to the Government as well as criminal defendants.

This court in *Parr v. United States*, *supra*, cited *Lewis v. United States*, 216 U.S. 611, 30 S. Ct. 438, 54 L.Ed.637 (1910), but that case is distinguishable because there the statute of limitations had run and Mr. Lewis was therefore not subject to any refiling. Here, in contrast, Ms. Golay is definitely subject to another indictment, which would then result in her being deprived of her liberty for a significant amount of time while the issue might be resolved. If there were a second indictment, the Government would argue res judicata if Golay argued her first indictment should have been dismissed *with prejudice*.

In *Parr v. United States*, *supra*, the five Justices of this Court stated that a final judgment in a criminal case means the sentence. The Court stated that "the sentence is the

judgment." The Court concluded that unless there was a sentence there could be no appeal by a defendant in a criminal case. As stated earlier, this theory was rejected in *Abney v. United States* where this Court dispensed with the final judgment rule. In short, *Abney v. United States*, *supra*, modifies *Parr v. United States*, *supra*. In any event, the *Parr* case is not controlling because it is factually different.

This Court in the *Abney* case emphasized that routine rulings and orders by district courts are not directly appealable. This is so because the district courts should not be interrupted with piecemeal appeals. Thus, the routine matters cannot be heard by the courts of appeals prior to conviction and sentence. This Court stated in *Abney v. United States*, *supra*, 431 U.S. at 663, 97 S. Ct. at 2042:

> ". . . Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise non appealable questions to the attention of the Courts of Appeals prior to conviction and sentence."

That factor militating against appeals does not exist here because there can be no conviction and sentence in the instant case. There is no on-going federal proceeding which is being interrupted by the appeal that Golay has filed. Thus, unlike the ordinary run of the mill order denying a pretrial motion, which should not be appealed because it would interfere with the pendency of on-going federal proceedings, the instant case should have allowed the Ninth Circuit to review the order of the District Court since the order is final. The case has been terminated. Title 28, United States Code, Section 1291 says appeals may be filed "from *all final decisions*. . . ." We have a final decision here. Section 1291 does not say

"convictions." It says "final *decisions*." So, Golay should be able to appeal from the final decision. There should be no exceptions to this Congressional enactment. *See Bowles v. Russell* (no exceptions said a majority of this Court).

Clearly there is a case or controversy under Article III of the Constitution. Golay is attempting to prevent future harm. *See Abney v. United States*, *supra*. She is currently aggrieved. Even in cases where there is no final decision this Court has allowed appeals because standing trial would be the injury. *See generally Will v. Hallock*, ___ U.S. ___, 126 S. Ct. 952 (2006). Here there is no need to find that standing trial is a sufficient injury to justify dispensing with the finality requirement of Section 1291. There is no need to grant an exception to the finality requirement because here there is a final decision.

If Golay cannot appeal, no one could appeal repeated dismissals without prejudice. What would happen if the Government repeatedly indicted and then dismissed without prejudice. What if the Government did so 10 times in a row to keep the defendant in custody with no trial. There must be appellate jurisdiction to prevent such misconduct.

Perhaps if the Government inadvertently indicts and quickly dismisses a case in good faith, where the defendant is not in custody, we might have a different case. Here Golay was not even given a hearing.

We do not even know if the district court read or considered Golay's opposition. The dismissal order does not say.

This Court should not look at the merits of the appeal. Golay was deprived by the district court of making an

adequate record for appeal. Indeed, that was one of her grounds for appeal.

CONCLUSION

For the foregoing reasons, petitioner Golay respectfully asks this Court to issue a writ of certiorari to review the judgment of the Ninth Circuit and to reverse it with instructions to reinstate Golay's appeal

Respectfully submitted,

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